Filed 1/7/11 In re Jose L. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JOSE L., A Person Coming Under the Juvenile Court Law.	B221869 (Los Angeles County Super. Ct. No. CK65716)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. OLIVIA D. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Kading Martinez, Commissioner. Affirmed.

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant and Appellant Olivia D.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant N.L.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds for Plaintiff and Respondent.

Appellants Olivia D. (Mother) and N.L. (Father) appeal a juvenile court order placing their son Jose L. into guardianship. Appellants contend that because the caseworker's assessment report was served and filed on the day of the hearing rather than 10 days earlier, the court was required to continue the matter to allow appellants to review the report and hold a contested hearing. Appellants further contend the court's post-guardianship visitation order lacked the requisite specificity. Respondent concedes the report was not filed within the time frame specified by the rules, but contends the error was harmless. Respondent further contends that because the court's guardianship order stated that prior orders not in conflict would remain in effect, the court's earlier orders with respect to the frequency and duration of visitation supplied the necessary specificity. We agree with respondent and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Initiation of Proceedings and Reunification Period*

Proceedings in this matter were initiated in November 2006, when Mother's three children, Jose (then 9), his 10-year old sister and his 3-year old half-brother, were detained after Mother left them in the care of a 19-year old neighbor who was virtually a stranger.[1] At the jurisdictional hearing, the court found that Mother left the children without making an appropriate plan for their care and that she abused illicit drugs.[2] The Department of Children and Family Services (DCFS) did not

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[1] The appealed order affected Jose only.

[2] Mother did not contest the jurisdictional finding. In an interview, she admitted frequent use of methamphetamine beginning in 2005. The court ordered a psychological evaluation of Mother, but she was not found to be suffering any serious malady.

locate Father until October 2007.[3] Father made his first appearance at the 12-month review hearing which took place in January 2008. The court deemed him an alleged father only and did not order DCFS to provide reunification services, although the court ordered monitored visitation for Father. Father began visiting the children in 2008.[4]

Mother's compliance with the reunification plan was spotty at first, but by May 2008, she had shown sufficient progress that Jose and his sister were returned to her care.[5] In August 2008, however, Mother was arrested on an outstanding warrant and appeared to be headed for a prison term of at least one year. DCFS filed a Welfare and Institutions Code section 342 subsequent petition and the children were re-detained.[6] Because 18 months had passed since the original detention, the court ordered no further reunification services for Mother and set a section 366.26 hearing.

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[3] Father was identified as the biological father on the birth certificates for Jose and his sister. Mother informed the caseworker that Father lived in Mexico and had not been involved with the family or supported the children for many years. In one interview, Mother said that Father had never seen his daughter and did not even know about Jose. In a paternity statement filed with the court, Father said he had lived with Mother and Jose's older sister from 1996 to 1997 and had visited both children during 2005 and 2006, until they were detained by DCFS. When he made his first appearance, he represented to the court that he had lived at the same address in Los Angeles for the preceding 10 years. The court made no findings on these matters, but it is clear from the record that at the time of the detention, Jose regarded Faustino, Mother's husband and the father of Jose's half-brother, as his father.

[4] During this period of detention, the children were residing in a group home.

[5] Mother's youngest child was eventually placed with his father, Faustino, and jurisdiction was terminated as to him.

[6] Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

B. *First Section 366.26 Hearing*

After re-detention, Jose and his sister were placed in a single foster home, but were soon separated because they were fighting. Initially, both children stated that they wanted to return to Mother. They expressed no desire to see Father. For a brief period following the re-detention, DCFS was unable to get in touch with Father.[7] In November 2008, Father contacted DCFS and regular visitation recommenced. The caseworker reported that the children were "distant" with Father and continued to appear uninterested in residing with him.

Mother was released from incarceration in November 2008 and in February 2009, filed a section 388 petition seeking custody of Jose and his sister. Her petition was summarily denied. Mother also began visiting the children regularly. The foster parents described the quality of the visits as "poor" because Mother talked to the children about her arrest and her experiences in prison and was often on her cell phone. The caseworker also reported that Mother encouraged the children to withhold information from DCFS.

In February 2009, DCFS filed its first section 366.26 report in the proceeding. The report stated that the children had begun to settle into their respective foster homes. It recommended foster care as the long-term plan because neither foster parent was interested in guardianship or adoption at that time. At the February 2009 section 366.26 hearing, the court ordered foster care as the permanent plan, as recommended. The court's order permitted the parents to have monitored visits.

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[7] Just prior to the re-detention, Father informed the caseworker that he was unable to "manage" the children and did not want further contact with them.

C. *Postpermanency Review Hearings*

After selecting foster care as the permanent plan, the court, as required by the governing statutes (see § 366.3, subd. (h)), held regular status review hearings. Prior to the first review hearing in May 2009, DCFS reported that Jose was doing well in his placement. Mother and Father were still visiting. Mother still occasionally said inappropriate things during visits, but her behavior was improving. Father reported that Jose's foster mother, Rosa P., had interfered with his visitation for a period of time, but according to the caseworker, this matter had been resolved.[8] DCFS continued to recommend long-term foster care as the permanent plan. Jose's counsel informed the court at the hearing that Jose desired less frequent visits with Father. The court reduced visitation between Father and Jose to twice a month.

In a report filed prior to the next review hearing in October 2009, the caseworker reported that Mother had missed a number of visits with Jose and he and Rosa had said that he no longer wished to have visits with Mother.[9] In addition, Jose told the caseworker he did not want his Father's visits to continue. Jose told his foster mother that he was happy with her and wanted to stay with her. Rosa informed the caseworker she was willing to become Jose's legal guardian. Accordingly, DCFS recommended setting a new section 366.26 hearing to change the permanent plan to legal guardianship.

At the October 2009 review hearing, Mother's counsel informed the court that Mother was having difficulty getting to the visits because the location was a

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[8] Father also reported that Mother was interfering with his visits with Jose by telling the boy he should not visit Father.

[9] In September, Jose's sister ran away from her placement and has apparently not been found.

three-hour bus ride from her home and asked that the location be changed. Father's counsel inquired about the report that Jose wanted less frequent or no visits with Father and informed the court that Father desired more frequent visits. Jose's counsel explained that Jose sometimes had activities that conflicted with visitation, but that he wanted visits with Father to continue. Jose did, however, want visits with Mother to be less frequent. Jose's counsel also stated that Jose was in agreement with the recommendation to change the permanent plan to guardianship. The court scheduled a second section 366.26 hearing for January 25, 2010 to consider changing the permanent plan to guardianship. With respect to visitation, the court ordered that parental visits were to take place every other weekend and gave DCFS discretion to liberalize.

D. *Second Section 366.26 Hearing*

DCFS's assessment report for the section 366.26 hearing was served and filed on the day of the hearing (January 25, 2010). The report stated that Mother had ceased visiting Jose and was no longer in contact with DCFS.[10] It stated that the visits with Father were going well, although Father occasionally missed visits due to his work schedule. Prior to the hearing, both Rosa and her long-time male companion, Francisco G., declared their desire to become Jose's legal guardians. Rosa said that Jose had improved behaviorally and academically since moving into their home. The report provided personal information about Rosa and Francisco, including that they had been together for more than 15 years, had raised three biological children and were caring for three other foster children (two were over

[10] Interviewed by the caseworker, Mother attributed her failure to visit to the fact that she was pregnant, to her bad health, to her varied work schedule, and to her "sad" emotional state caused by Jose's statements that he wanted the visits to stop.

18). The caseworker re-interviewed Jose, who again expressed approval of the change to guardianship and said he did not want to be returned to his parents.

At the January 25 hearing, both Mother and Father claimed that there had been a "defect in notice" and objected to going forward on the guardianship issue. The court asked them to address whether the matter should be continued for contest or whether it should be argued that afternoon, after a brief recess. Counsel for Mother stated that she was requesting a continuance because the report had not been filed 10 days prior to the hearing. Counsel also stated that Mother intended to present evidence that she had left unanswered messages for the caseworker and had tried to visit Jose, but had been prevented by the foster mother. Counsel for Father stated that he would seek to establish that he and Jose were bonded. In addition, Father wished to present evidence of his concern that if Rosa became Jose's guardian, she would interfere with Father's visitation. The court concluded that, even if true, the proposed evidence would not support a finding that guardianship would not be in Jose's best interest; accordingly, the court found the matter need not be set for contest. Nevertheless, the court initially agreed to continue the hearing to March. After reviewing the case file, the court reversed itself, finding that both parents had been present at the October 2009 review hearing when the section 366.26 date had been set and had been properly served with written notice. The court also concluded that there was no reason for a continuance because there was no statutory obligation to serve the assessment report 10 days prior to the hearing.

Turning to the substance of the hearing, the court found that it was in Jose's best interest to grant the guardianship request and named Rosa and Francisco as Jose's guardians. With respect to visitation, the court stated that parental visitation would be "as arranged by the guardians." The written order stated: "Parents have monitored visits in DCFS office or with any DCFS approved monitor." The court

said nothing about the timing or duration of parental visits, either on the record or in its written order. The written order did, however, state: "All prior orders not in conflict shall remain in full force and effect." Mother and Father appealed the January 25, 2010 order.

DISCUSSION

A. *Failure to Continue Hearing*

Under the governing statutes, where the permanent plan chosen is long-term foster care, the court must hold regular status review hearings at which it considers "all permanency planning options for the child," including "whether the child should be returned to the home of the parent, placed for adoption, . . . or appointed a legal guardian." (§ 366.3, subd. (h); *Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 340.) At the end of each such hearing, "the court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship." (§ 366.3, subd. (h).) "[T]he statutory scheme provides that a child in long-term foster care shall not slip into oblivion; her status shall be reviewed every six months to make sure efforts are continuously being made to find her a more permanent placement." (*Sheri T.*, *supra*, at p. 340.)

When the court decides the time has come to hold a section 366.26 hearing to reassess the permanent plan for the child, it must "direct the agency supervising the child . . . to prepare an assessment." (§ 366.21, subd. (i)(1).) Although the statute does not state when the assessment must be filed and served, the California Rules of Court provide that the agency must serve and file the assessment "[a]t

least 10 calendar days before the hearing." (Cal. Rules of Court, rule 5.725(c).) Respondent concedes that DCFS's January 2010 report containing its assessment of the proposal to change Jose's permanent plan from foster care to guardianship was not filed and served in a timely manner. It notes, however, that the rule provides no penalty for the late service of a report, and argues that any error in failing to continue the January hearing was harmless.

1. *Nature of Error*

Preliminarily, we must determine whether the failure to continue the matter when a report is untimely filed was trial error subject to harmless error review or structural error. Citing *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535 (*Judith P.*), appellants contend the failure to continue a hearing when the required assessment report is not provided 10 days beforehand constitutes per se reversible error. That case involved a different report -- the report the agency must file to address the reunification services provided to the parent. (See § 366.21, subd. (c).) Having received the report fewer than 10 days prior to the 12-month review hearing, the parent requested a continuance, which the juvenile court denied. The appellate court held that going forward with the 12-month review hearing and terminating reunification services when the parents had not had the statutorily-required time to review and digest the report constituted structural error which rendered the proceeding fundamentally unfair. (102 Cal.App.4th at pp. 553-558.) In so doing, however, the court distinguished *In re Angela C.* (2002) 99 Cal.App.4th 389 (*Angela C.*), where the agency had failed to provide the mother proper notice of a section 366.26 hearing and the appellate court had found this to be trial error, reviewed under a harmless error standard, rather than structural error. The court in *Judith P.* explained that there was an important difference between procedural error which occurred during the reunification period and procedural

error which occurred later in the proceedings. *Angela C.* involved post-reunification permanency planning, where "the parent bears the burden of proving that a particular disposition would be in the child's best interests," whereas in *Judith P.* the case was still in the reunification stage when "the interests of the parent vis-à-vis the minor are stronger"; at that stage, the court must find that "return to the parent would be detrimental to the child" and "DCFS bears the burden of proof." (102 Cal.App.4th at p. 554, fn. 13.) "It is fundamentally unfair to terminate either a parent's or a child's familial relationship if the parent and/or child has not had an adequate opportunity to prepare and present the best possible case for continuation of reunification services and/or reunification." (*Id.* at pp. 557-558, italics omitted.)

Here, the matter was even further along than in *Angela C.* The court had already held one section 366.26 hearing and several status review hearings. At each of those hearings, a presumption arose that continuing Jose in long-term foster care was inappropriate, and appellants bore the burden of establishing that a new permanent plan would *not* be in the best interest of Jose once it became clear that the foster family was willing to consider guardianship. (§ 366.3, subd. (h); *Sheri T. v. Superior Court*, *supra*, 166 Cal.App.4th at p. 341; *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1181; see *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888 [at post-permanency review hearings, juvenile court "proceeds under a presumption that long-term foster care is *inappropriate*" and "is obligated to act accordingly"]; *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147 [at post-permanency review hearing, parent bears burden of showing that removing minors from permanent placement and returning them to her care would be in their best interests].) Accordingly, *Judith P.*'s holding does not preclude a finding that the error in this case was harmless.

Moreover, even absent this distinction, the California Supreme Court has cautioned against borrowing criminal law concepts of structural error and applying them to dependency. In *In re Celine R.* (2003) 31 Cal.4th 45, where the appellants contended that the court erred in appointing a single attorney to represent minors with potentially competing interests, the court concluded that "failure to appoint separate counsel for separate sibling is subject to the . . . harmless error standard." The court found the attempted analogy to criminal law -- where such an error would be deemed structural -- inapt because "[i]n a criminal case, reversal of a criminal judgment is virtually always in the defendant's best interest," but "[t]he delay an appellate reversal causes might be contrary to, rather than in, the child's best interests." (*Id.* at p. 59.) "After reunification efforts have failed, it is not only important to seek an appropriate permanent solution -- usually adoption when possible -- it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo." (*Ibid.*; see *In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1420 [questioning whether *Judith P.* remained good law after the Supreme Court's decision in *Celine R.*].) Automatically reversing a juvenile court order improving a minor's status from long-term foster care to guardianship merely because the parents were not afforded 10 days to review the assessment report would, in our view, be unwise and contrary to the policy of dependency law recognized by our Supreme Court in *Celine R.*

2. *Prejudice*

Having concluded that harmless error review is appropriate, we turn to whether there is evidence of prejudice. DCFS's January 2010 report offered the good news that Rosa had changed her mind about guardianship and that another adult -- Francisco -- had agreed to share the duty. Apart from a brief update

concerning Jose's feelings about the guardianship and visitation with his parents and a few personal facts about the prospective guardians, their family and their relationship, it held little new information. Father states in his brief that he wanted to investigate and present evidence concerning whether Rosa and Francisco were interfering with his visits and whether Rosa misrepresented to the caseworker that Jose no longer wished to visit Father as stated in the October 2009 report. Father further contends that he wished to contest the sincerity of Rosa and Francisco's commitment to Jose based on the fact that they "were not married but merely cohabiting." Mother presents no new argument concerning prejudice, but reiterates in her brief the argument presented to the juvenile court -- that she wished to contest statements in the report that she was no longer in contact with the caseworker and present evidence of interference with visitation by Rosa.

With respect to the relationship between Rosa and Francisco, the couple had been together for 15 years. They had raised biological children of their own. They had been approved as foster parents and were caring for multiple foster children. They had consistently cared for Jose since the re-detention in 2008. Their marital status had no relevance to their commitment to him or their appropriateness as guardians. With respect to the alleged interference with visitation, we do not see any way in which presentation of evidence on this issue was precluded by the lateness of the January 2010 report. Moreover, although parental visitation has some bearing on the court's decision at a permanency hearing (see § 366.21, subd. (i)), quibbling over the party to fault for every missed visit would not have been useful to the court's determination. The reports established that Father was visiting regularly, except when he missed visits due to work, and that in the preceding months Mother had missed a significant number of scheduled visits due to a variety of personal problems. Even had appellants presented evidence showing that their failure to visit on some occasions was due to the guardian's interference

rather than their own personal issues, the court could not reasonably have rejected guardianship, given the strong presumption in its favor. Indeed, the remedy for any such interference, if found, would have been to clarify and enforce the court's visitation order, not to keep Jose in foster care forever. Accordingly, we conclude that appellants suffered no prejudice as a result of the court's failure to continue the hearing.

B. *Failure to Hold Contested Hearing*

Appellants contend that the court erred in failing to hold a full evidentiary hearing at which they were permitted to cross-examine witnesses and present evidence. In general, parents have a due process right to present evidence and cross-examine witnesses at section 366.26 hearings. (See, e.g., *In re Josiah S.* (2002) 102 Cal.App.4th 403, 417-418; *In re Kelly D.* (2000) 82 Cal.App.4th 433, 439-440.) However, the "right to 'due process' at the hearing under section 366.26" is "a flexible concept which depends upon the circumstances and a balancing of various factors." (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.) "The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*Id*. at p. 817.) "The state's strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation], such as when the presentation of the evidence will 'necessitate undue consumption of time.'" (*Maricela C. v. Superior Court, supra*, 66 Cal.App.4th at pp. 1146-1147, quoting Evid. Code, § 352.) Even where a parent's representations are "true" and "could have been substantiated at an evidence hearing," if they are insufficient to meet the parent's burden, the court does not err in refusing to waste time and resources on a full hearing. (*Maricela C., supra*, at p. 1147.) "The trial court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can determine

whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses." (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.)

The court asked counsel for an offer of proof concerning the evidence their clients intended to introduce if the matter were continued for contest. Counsel for Mother stated that she intended to present evidence that the foster mother had interfered with her attempts to visit Jose and would establish that she had left messages for the caseworker, contrary to statements in the report indicating that she had ceased all contact with DCFS. Counsel for Father stated he would seek to establish that he and Jose were bonded and that he would also raise his concern that Rosa would interfere with his visitation in the future. The court found that the offer of proof was inadequate. We agree. Mother's attempts to stay in contact with DCFS and Father's evidence of bonding were irrelevant to the issue of guardianship versus foster care. Although parental visitation was a matter for the court to consider, the court had before it multiple reports describing the amount of visitation, the appropriateness of visitation, Jose's feelings concerning visitation and the parents' reasons for missing visits. The court could reasonably conclude that additional evidence on these matters would not have been necessary or helpful to its determination.

C. *Visitation*

Appellants contend the court abused its discretion in granting the legal guardians excessive control over visits with Jose.

There is no dispute that when a court selects guardianship as the permanent plan, it must make an order for visitation with the parents unless it finds that such visitation would be detrimental to the child. (§ 366.26, subd. (c)(4)(C); *In re M.R.* (2005) 132 Cal.App.4th 269, 274.) Appellants note that the court stated they were

to have "monitored visits in DCFS office or with any DCFS approved monitor" in the written order, and that parental visitation would be "as arranged by the guardians" on the record. They contend that because the court said nothing about frequency or duration, the order was too indefinite to stand. As respondent points out, however, the January 25 order further stated that "[a]ll prior orders not in conflict shall remain in full force and effect." The court's October 30, 2009 order had specified that the parents were to have monitored visitation every other week. The January 25 order clarified that the guardians were responsible for making the final arrangements, but did not give them the power to forbid visitation entirely. Accordingly, the visitation order was sufficiently definite. (See *In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374 [court may delegate details of visits to third party, including time, place and manner].)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.